

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION TWO

No. 47375-5-II

JAMES D. GOODMAN,

Respondent,

v.

AIRBORNE EXPRESS, INC.,
Appellant.

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DIVISION II
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BRIEF OF RESPONDENT JAMES D. GOODMAN

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COUNTER-STATEMENT OF THE CASE

On March 5, 2002, James Goodman was involved in a car accident while on the job driving a delivery truck for Airborne Express. He suffered serious injuries. The parties do not dispute most of his injuries: a C5-6 disc herniation which was treated with a C5-6 anterior cervical fusion; left-sided radiculopathy; surgery in the form of a right shoulder subacromial decompression; and cardio myopathy. He presented a claim for worker's compensation benefits.

On February 10, 2011, the Department of Labor and Industries closed Goodman's claim and instructed Airborne to pay permanent partial disability of 14% of the amputation value of the right arm at or above the deltoid insertion or by disarticulation at the shoulder; and pay a permanent partial disability award of Category 2 of permanent cervical and cervico-dorsal impairments.

The employer did not appeal any part of the award. Airborne had gotten the relief it sought: closure of the claim.

Goodman timely appealed. He alternatively challenged the closure of the claim and the Department's decision that he was only partially disabled. He contended he was permanently totally disabled. (CP 866)

On January 17, 2013, the industrial appeals judge reversed the award. The judge agreed that the progression of Goodman's injuries made him

unable to perform and obtain gainful employment making him temporarily totally disabled as of January 7, 2009. The judge also decided, however, that a carpal tunnel condition that was discussed in the Department hearing was not fixed and stable, and therefore his claim should not have been closed.

(CP 99) The appeals judge stated:

Having determined that Mr. Goodman's carpal tunnel syndrome is proximately related to his industrial injury, it necessarily follows that the claimant was not fixed and stable as of February 10, 2011, because surgery for the carpal tunnel syndrome was not performed until May, 2011. It is, therefore, premature to rate the extent of Mr. Goodman's permanent disability, either partial or total.

(CP 96)

Goodman timely appealed to the Board of Industrial Insurance Appeals. Airborne again did not appeal any part of the decision. The Board summarized Goodman's contentions on appeal as follows: "Mr. Goodman maintains that we should order the Department to determine he was permanently totally disabled instead of keeping the claim open for treatment."

(CP 86)

On April 17, 2013, the BIIA affirmed the appeals judge. (CP 43) As had the appeals judge, the Board agreed that Goodman was totally disabled from January 7, 2009. But, as the appeals judge had, the Board also concluded it was premature to determine whether the disability was permanent or temporary. The BIIA summarized the basis for its decision as

follows:

Mr. Goodman does not dispute our industrial appeals judge's determination to allow his left carpal tunnel condition under the claim. Nonetheless, he argues he was entitled to a pension when his claim was closed. If Mr. Goodman's carpal tunnel condition is allowed under the claim, we cannot determine all of the conditions proximately caused by his industrial injury had reached maximum medical improvement by February, 2011. After all, Mr. Goodman had carpal tunnel release surgery in May, 2011. It is a long-established principle that industrial insurance claims should be kept open until all industrially related conditions have become fixed and stable. *See, Pybus Steel Co. V. Department of Labor & Indus.*, 12 Wn. App. 436 91975). We recently reaffirmed this principle by holding this Board cannot adjudicate a worker's eligibility for permanent total disability benefits if an industrially related condition still needs treatment. *In re Carolyn Bowers*, BIIA Dec., 10-18398 (2011). Therefore, we cannot determine that Mr. Goodman had become permanently totally disabled as of February, 2011.

(CP 44)

Goodman timely appealed to the Superior Court. Airborne again did not appeal any part of the decision. Goodman's Notice of Appeal listed and attached all three previous orders (February 10, 2011; January 17, 2013; April 17, 2013) as the basis for his appeal. (CP 2) Goodman asked the trial court to decide that the Board was incorrect in its finding of temporary total disability and in need of treatment. He wanted the court to find that he was permanently totally disabled. (CP 856)

Before trial, Goodman asked the Court to clarify the issues it would consider in the appeal. (CP 356; RP 05/09/2014) Despite having not

appealed any part of any of the previous decisions when the case was under consideration by the BIIA, Airborne wanted to argue that even the finding of temporary total disability was improper because Goodman was employable. (RP 05/09/2014 at 7) Goodman wanted to preclude that argument again, and asked the judge to prohibit the argument in the trial court. (CP 857; RP 05/09/2014 at 3-4) In response, Airborne argued that because Goodman's appeal was broadly stated and merely cited the various orders, Goodman could not limit the issues on appeal. Airborne stated:

The employer, even as the non-appealing party, can contest the Board's factual findings. *See Cantu v. Department of Labor & Indus.*, 168 Wn. App. 14, 277 P.3d 685 (2012). In fact, on review, the Superior Court may substitute its own findings and decision for those of the Board's if it finds from a fair preponderance of the credible evidence that the Board's findings and decision are incorrect. *See Jenkins v. Meyerhaeuser [sic] Co.*, 143 Wash. App. 246, 177 P.3d 180, review denied, 165 Wn.2d 1004, 198 P.3d 511. Therefore, the scope of review before the trial of fact is not limited to the issues presented by Mr. Goodman, but instead, all of the issues raised in the Notice of Appeals [sic] and the issues tried expressly or impliedly by the parties are before the Superior Court.

(CP 863.) The trial court rejected the argument. Regardless of whether it could consider the issue, the court ordered that because Airborne had not appealed the determination that Goodman was unemployable after January 7, 2009, it could not challenge the fact in Goodman's appeal. (CP 892) Therefore, the only issue on appeal was whether Goodman was permanently

totally disabled as he contended or temporarily totally disabled as the Board had found.

After a bench trial, the Court concluded that Goodman was temporarily totally disabled from January 7, 2009, and permanently totally disabled from February 11, 2010. On the carpal tunnel issue, the trial court stated:

All right. Well, when I reviewed this, I mean, I basically set aside the carpal tunnel, which may or may not be related to the original injury; but it does appear that even before the carpal tunnel, he was permanently totally disabled; and the Court is going to so find.

(RP 06/06/2014 at 15)

Airborne has appealed.

ARGUMENT

1. The Court should not consider the Department's brief

In the trial court the Department filed a "Notice of Non-participation." (CP 35-37) In it, the Department gave notice that "it will not appear or take part in the case," an option it noted was given to it by RCW 51.52.110 in appeals to the superior court when the employer is a self-insurer. Consistent with this, the Department did not participate in the trial court proceedings.

A party to litigation who disclaims an interest in the litigation is not a proper or necessary party to an appeal that follows. *Smalley v. Laugenour*, 30 Wash. 307, 310-11, 70 P. 786 (1902). In this appeal, the Department has

filed a respondent's brief that essentially assumes the role of the appellant. It has cited no authority that it may opt in and out of a case at its whim. Because it disclaimed any interest in the litigation, did not participate in the trial court proceedings, did not object to any of the trial court's decisions, did not preserve any error it claims occurred for review and did not file a notice of appeal, the Department is not a proper appellant or respondent. The court should, therefore, disregard its brief.

2. Standard of Review

The standard of review applicable to a trial court reviewing a BIIA decision is considerably more broad than the standard applied when a Court of Appeals reviews that trial court's decision. A trial court's review of a BIIA decision is de novo. RCW 51.52.115. There is a new trial with the superior court reviewing, reconsidering and pondering anew the evidence in the record. *Ravsten v. Dep't of Labor & Indus.*, 108 Wn.2d 143, 146, 736 P.2d 265 (1987). Accordingly, the superior court may substitute its own findings and decision for the Board's if it finds from a fair preponderance of credible evidence that the Board's findings and decision are incorrect. *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999).

In an appeal of a superior court decision on an appeal from the BIIA, the Court of Appeals reviews whether substantial evidence supports the trial court's factual findings and then reviews, de novo, whether the trial court's

conclusions of law flow from the findings. *Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 180, 210 P.3d 355 (2009); *Watson v. Dep't of Labor & Indus.*, 133 Wn. App. 903, 909, 138 P.3d 177 (2006). The appellate court takes the record in the light most favorable to the party who prevailed in superior court. The court does not re-weigh or re-balance the competing testimony and inferences, or apply anew the burden of persuasion. *Rogers* at 180-81.

3. The trial court did not decide Goodman's CTS was unrelated to the industrial injury, rather that Goodman was permanently disabled even if the CTS was related.

In its written findings, the trial court stated that the industrial injury was not the proximate cause of the left sided CTS. (CP 1030). Written findings may be supplemented by the trial court's oral decision or statements in the record. *In re Det. of LaBelle*, 107 Wn.2d 196, 219, 728 P.2d 138 (1986). In its oral ruling, the court made clear that it was not actually deciding the issue:

All right. Well, when I reviewed this, I mean, I basically set aside the carpal tunnel, which may or may not be related to the original injury; but it does appear that even before the carpal tunnel, he was permanently totally disabled; and the Court is going to so find.

(RP 06/06/2014 at 15) The court's statement shows it was not deciding that Goodman's CTS was unrelated to the industrial injury, but that regardless of whether it was related, Goodman's other conditions made him permanently

totally disabled.

Moreover, even assuming that the evidence conclusively established the CTS was related, the trial court could still decide Goodman's claim should have been closed. The Board relied upon the CTS surgery, not the CTS itself, as the basis for the decision of temporary total disability. To provide the basis for the decision of temporary total disability, there must be proof that the surgery was related to the injury as well. RCW 51.36.010(2); WPI 155.11.01. This record, however, does not establish the causal connection between the surgery and the industrial injury.

4. Substantial evidence supported the trial court's decision that Goodman's CTS condition was not related to the industrial accident, but that Goodman was permanently totally disabled regardless of the CTS.

Substantial evidence is evidence sufficient to persuade a rational, fair-minded person of the finding's truth. *Maplewood Estate, Inc. v. Dep't of Labor & Indus.*, 104 Wn. App. 299, 304, 17 P.3d 621 (2000). Evidence may be substantial enough to support a factual finding even if the evidence is conflicting and could lead to other reasonable interpretations. *Fred Hutchinson Cancer Research Center v. Holman*, 107 Wn.2d 693, 713, 732 P.2d 974 (1987).

The evidence here showed that Mr. Goodman was involved in a T-bone motor-vehicle collision while on the job, on March 5, 2002. The force

of the collision spun his delivery van, sending it into a ditch. The impact broke his seatbelt. He immediately noted severe pain in his neck, right shoulder, and right arm. During the period of time his claim was open, he underwent a cervical fusion and shoulder surgery.

To determine whether substantial evidence supported the trial court's decision that Goodman's CTS condition was not related to the industrial accident, but that Goodman was permanently totally disabled regardless of the CTS, the court simply needs to look at the testimony of Todd Larson, MD. Dr. Larson was Goodman's primary-care physician since before the 2002 collision. As Goodman's primary care provider, he was familiar with Goodman's condition from the outset. He was Mr. Goodman's attending physician on the L&I claim from 2006 through 2010. Dr. Larson was in the best position to evaluate Goodman's condition.

Dr. Larson's testimony that the CTS was not related to the accident was clear and unequivocal. At one point he states: "I could not relate the carpal tunnel syndrome to the accident . . ." (CP 496) At another, in response to the question "The other diagnoses [CTS and cardiomyopathy] are non-related diagnoses?" he states: "Correct." . ." (CP 499-500) At another, in response to the question "Are you able to tell us on a more probable than not basis as to whether you have an opinion as to the relationship of those diagnoses to the motor vehicle accident on March 5th, 2002, Dr. Larson

testified:

The opinion is that the neck condition and cervical radiculopathy were related to the motor vehicle accident on a more-probable-than-not basis. *The carpal tunnel syndrome, it's hard to relate that to the motor vehicle accident*; though certainly if you have a preexisting neck condition it can worsen symptoms from nerve irritation downstream; i.e., the carpal tunnel syndrome. Three, depression related to sequella from his neck injury; again, related to the motor vehicle accident. And lastly, nonischemic cardiomyopathy more likely than not related to the Lyrica.

(CP 502-03) He went on to testify “there’s not much more that can be done for Jim at this point in time and that I would label his conditions fixed and stable. (CP 504)

Despite not relating CTS to the accident, Dr. Larson’s testimony was equally clear that Goodman was permanently totally disabled.

Q. Are you able to give us an opinion on a more-probable-than-not basis as to whether he’s permanently and totally disabled from any reasonably continuous, gainful employment?

Dr. Larson: I am.

Q. What is that opinion?

Dr. Larson: That he is disabled from any continuous, gainful employment.

(CP 504) On cross examination, Airborne’s counsel asked him: “Is there anything you can think of that he’d be able to do from a vocational standpoint?” Dr. Larson answered, “No.” (CP 516)

While the testimony of Goodman's primary care physician alone was sufficient to support the trial court's decision, the testimony of other witnesses also lends support. For example, C. Stephen Settle, MD, stepped in as Goodman's attending physician after Dr. Larson moved out of state. Dr. Settle concurred with Dr. Larson's prognoses. The most Dr. Settle would say about CTS is that Goodman's other injuries "could have" made carpal tunnel syndrome symptomatic. (CP 433) Nevertheless, Dr. Settle testified Goodman was not capable of reasonably continuous gainful employment. (CP 435) Dr. Settle also testified there was nothing more curatively that could be done for Goodman. (CP 434)

Kevin Schoenfelder, MD, one of Airborne's experts was equivocal about whether the source of Mr. Goodman's left arm pain was CTS or the spinal injury. With regard to his diagnoses of the left arm pain and weakness, he testified:

Dr. Schoenfelder: At that time it was my belief that [Mr. Goodman] was having problems with some nerve compression within his neck that was affecting and causing the pain, weakness, and numbness into his left arm.

Q. Is that also known as "radiculopathy"?

Dr. Schoenfelder: "Cervical radiculopathy." Essentially, the definition of the word "radiculopathy" means there's a pain in a distribution in the arm or in the leg that relates to the compression coming from the neck.

(CP 694) Following epidural injections that failed to provide Goodman with anything more than temporary relief, Dr. Schoenfelder testified that a carpal tunnel procedure would be necessary if the CTS were worsening Goodman's impaired neck and shoulder. His ultimate findings were the opposite, however:

Q. What were your findings and recommendations at that time?

Dr. Schoenfelder: Well, the impression at that time, on examination, was telling us that he appeared to have some left carpal tunnel syndrome; in other words, a compression of the nerve at the wrist that could be worsening the symptoms of his neck and shoulder problems as well. Again, we didn't want to do any further epidurals because of the short duration of relief, so we didn't feel as though there were other treatment options other than to consider, again, looking at the EMG and **if it** correlates with the carpal tunnel syndrome, to do a release of the carpal tunnel.

...

Dr. Schoenfelder: In this case, my belief is he was having some compression of the nerves at his neck that was causing swelling, and that swelling was causing increased compression of the nerve at his wrist and that was then becoming a contributing factor to focal weakness, numbness, and loss of functional abilities.

(CP 699-700 (emphasis added)) Ultimately, Dr. Schoenfelder did not discern any diagnostic findings from the EMG, obviating the need for a carpal tunnel release. (CP 702-03) Despite this, Dr. Schoenfelder agreed that considering Goodman's physical condition and the medications he was taking, Goodman was not capable of employment. (CP 713-14)

Airborne concedes that Drs. Manoso, Jones and DeVita refused to relate Goodman's CTS to the injury. (Brief at 35) It argues, however, that the trial court could not rely on those opinions without also accepting their opinions that Goodman was employable. It cites no authority for that proposition, which lacks a reasonable basis. A trier of fact is not compelled to accept all opinions of an expert if it accepts one. See *Kohfeld v. United Pacific Ins. Co.*, 85 Wn. App. 34, 42, 931 P.2d 911 (1997)("It is within the province of the jury to accept or reject, in whole or in part, an expert's opinion, and this court will not second-guess the jury's credibility determinations."); WPI 2.10.

Here, all the medical witnesses observed the same limitations in Goodman. Based on those limitations, some opined he was not capable of employment, some opined he was. The trial court was not compelled to accept any of those opinions simply because it agreed with some of the other opinions the same provider offered.

The trial court was justified in putting more weight on the testimony of Drs. Larson and Settle in light of the duration of their contact with Goodman. See *Hamilton v. Dep't of Labor & Indus.*, 111 Wn.2d 569, 571, 761 P.2d 618 (1988)(upholding a trial court's jury instruction advising the jury to give "special consideration" to the opinion of a workers' compensation claimant's attending physician); *Young v. Dep't of Labor &*

Indus., 81 Wn. App. 123, 128-29, 913 P.2d 402 (1996) (recognizing that a physician who has attended a patient for a considerable period of time may be better qualified to give an opinion as to the patient's disability than a doctor who has seen and evaluated the patient only once). The court could also place significance on the equivocation and lack of diagnosis from Dr. Schoenfelder, and the outright denial of relationship by Drs. Manoso, Jones and DeVita. In total, the evidence was more than sufficient to support the trial court's decision that CTS was not related to the accident and Goodman was permanently totally disabled regardless of the CTS.

5. The trial court had authority to reach the issue of whether Goodman's CTS was related to the industrial injury.

Apart from the sufficiency of the evidence to support the trial court's findings, Airborne argues that the trial court lacked authority to decide whether Goodman's CTS was related to the industrial injury. In making the argument, Airborne conflates what are two separate issues: whether Goodman waived the right to challenge the CTS issue and whether the trial court had authority to decide the CTS issue. Airborne does not, and cannot argue the issue was not fully engaged in the trial court.¹ The answer to the first issue is no. The answer to the second is yes.

1. Airborne itself identified the issue as one to be considered in its trial brief. (CP 896)

A. Goodman's Petition for Review was sufficient to allow the issue to be reviewed.

RCW 51.52.104 provides that a party may dispute a decision of an appeals judge by filing a petition for review. The statute also provides: "Such petition for review shall set forth in detail the grounds therefore and the party or parties filing the same shall be deemed to have waived all objections or irregularities not specifically set forth therein." No court your author has located has construed the level of specificity required to properly engage an issue on appeal from a decision of an appeals judge. Our courts have, however, repeatedly recognized that the provisions of the Industrial Insurance Act, Title 51 RCW, should be liberally applied to achieve its purpose which is to provide expedient relief to those coming within its provisions. *Sacred Heart Med. Ctr. v. Carrado*, 92 Wn.2d 631, 635, 600 P.2d 1015 (1979).

Here Goodman disputed one issue, the appeal judge's decision that his disability was temporary versus permanent. The Board's decision makes clear that the determination of whether his disability was temporary or permanent was impacted in part by its determination of whether his CTS was related to the industrial injury. Challenging the temporary/permanent decision necessarily called the decision regarding the CTS into question. Goodman's Petition for Review was sufficient to include the CTS issue.

None of the cases Airborne or the Department cites requires a different conclusion. In each of the cases the employee raised on appeal an issue wholly independent from the Board's decision. See *Hill v. Dep't of Labor & Indus.*, 90 Wn.2d 276, 280, 580 P.2d 636 (1978) (holding party waived argument of IAJ's potential disqualification by failing to present argument to Board); *Leuluaialii v. Dep't of Labor & Indus.*, 169 Wn. App. 672, 684, 279 P.3d 515 (2012), *review denied*, 176 Wn.2d 1018 (2013) (holding claimant waived argument that closing order was not final because she failed to raise it in her appeal to the Board or petition for review of the Board's decision); *Merlino Const. v. City of Seattle*, 167 Wn. App. 609, 616 n.3, 273 P.3d 1049, *review denied*, 175 Wn.2d 1003 (2012) (holding claimant waived argument that a police officer was an independent contractor by failing to present argument to the Board or trial court); *Allan v. Dep't of Labor & Indus.*, 66 Wn. App. 415, 422, 832 P.2d 489 (1992) (holding claimant waived objection on grounds of insufficient notice because it was not set out in her petition for review to the Board). In none of the cases did the court address whether the articulation of one issue that necessarily called another issue into question was sufficient to raise the other issue.

B. The trial court could decide the CTS issue even if Goodman's petition for review did not preserve it.

RCW 51.52.115 states that upon appeals to the superior court "only such issues of law or fact may be raised as were properly included in the

notice of appeal to the board, or in the complete record of the proceedings before the board.” RCW 51.52.070 provides that a Notice of Appeal to the board “shall set forth in full detail the grounds upon which the person appealing considers such order, decision, or award is unjust or unlawful, and shall include every issue to be considered by the board, and it must contain a detailed statement of facts upon which such worker, beneficiary, employer, or other person relies in support thereof.” In *Brakus v. Dep’ of Labor & Indus.*, 48 Wn.2d 218, 220, 292 P.2d 865 (1956), the court interpreted RCW 51.52.070 to mean that the notice of appeal must include every issue the appealing party wishes the Board to consider, but in dictum recognized that the notice of appeal may be amended with the permission or suggestion of the Board. *Brakus*, at 223 (citing RCW 51.52.095). In *Lenk v. Dep’t of Labor & Indus.*, 3 Wn. App. 977, 478 P.2d 761 (1970), the court gave the Board’s scope of review under RCW 51.52.070 a more liberal interpretation, stating that both the scope of the Department’s order, as well as the content of the notice of appeal, determines the Board’s scope of review. *Lenk*, at 982 n. 9, 478 P.2d 761. In *Du Pont v. Dep’t of Labor and Indus.*, 46 Wn. App. 471, 730 P.2d 1345 (1986), the court applied these decisions to hold that a claimant did not waive his ability to challenge his disability status when he did not include it in a notice of appeal.

In his notice of appeal of the Department's decision, Goodman stated the issues as follows: "Claim to remain open, treatment, time loss, increased PPD, or in the alternative permanent pension." (CP 866) Because determining whether the CTS justified keeping the claim open or awarding a permanent pension, the CTS issue falls well within that statement. The trial court, therefore, acted within its authority if it decided that issue.

In fact, because of the way the CTS issue arose, Goodman could not have raised the issue any more specifically. The Department decided that Goodman was entitled to permanent partial disability. It did not decide – indeed, it implicitly rejected – that the CTS was not fixed, that the subsequent treatment for CTS was relevant, or that the CTS precluded closing the claim. The appeals judge was the first to make those decisions. Since the Department did not decide these issues, Goodman could not have included the issues with any more specificity in his notice of appeal to the Board. He could only appeal what the Department decided.

Moreover, courts always retain the ability to decide issues critical to a proper decision. *Falk v. Keene Corp.*, 113 Wn.2d 645, 659, 782 P.2d 974 (1989) (permitting review of a jury instruction despite counsel's inadequate objection because determining the meaning of the act was at the heart of the case and necessary to making a proper decision); *Postema v. Postema Enterprises, Inc.*, 118 Wn. App. 185, 195, 72 P.3d 1122 (2003)(reviewing

unpreserved error because “determining the meaning of RCW 4.24.010 is critical to this case and resolving it is necessary to making a proper decision.”); *Roberson v. Perez*, 156 Wn.2d 33, 39, 123 P.3d 844 (2005) (appellate court’s refusal to review issues not raised below is discretionary); *Belnap v. Boeing Co.*, 64 Wn. App. 212, 223 n.6, 823 P.2d 528 (1992) (court elected to address issue crucial to case not raised in petition for review before BIIA); *Shafer v. Dep’t of Labor & Indus.*, 140 Wn. App. 1, 6, 159 P.3d 473 (2007), *affirmed* 166 Wn.2d 710, 213 P.3d 591 (2009)(court elects to resolve waived issue pursuant to its inherent power to address issues necessary to a proper decision.)

The principle has particular application here. According to Airborne, correctly deciding whether the CTS could preclude rating Goodman’s impairment is an issue that is absolutely necessary to a proper decision in this case. In making its decision on that issue, the Board clearly erred by considering treatment subsequent to the Department’s February 10, 2011, order and deciding that the treatment precluded finding his condition fixed and stable. The relevant date in determining whether a condition is fixed is the date on which the closure order was issued. *Du Pont v. Dep’t of Labor & Indus.*, 46 Wn. App. at 477; *Roberts v. Dep’t of Labor & Indus.*, 46 Wn.2d 424, 425, 282 P.2d 290 (1955). Evidence relating to what a claimant’s condition was after the closure order is irrelevant. *DuPont* at 477. Because

the entire premise of the Board's decision rests on its erroneous application of the evidence regarding the CTS, reaching the CTS issue is critical to the proper disposition of the case. Because it was critical to the proper disposition of the case, the trial court correctly reached whether CTS was related to the industrial injury even if Goodman's petition for review was not sufficient to preserve the issue.

6. Even if the trial court erred in reviewing whether Goodman's CTS was related to the industrial injury, the error was harmless.

Airborne has, for the most part, pinned its appeal to its contention that the trial court erroneously decided Goodman's CTS was not related to the industrial injury. But, even accepting the contention as true, the error is harmless. By relating CTS to the industrial injury, Airborne concedes that the CTS added yet another condition that could contribute to Goodman's disability. Airborne does not dispute that substantial evidence supported finding Goodman disabled if the CTS condition was considered. Since the trial court concluded that Goodman was totally disabled without considering the CTS, adding CTS would not lessen support for the finding of total disability, it would strengthen the support. Simply put, factually the trial court's decision could not have been more favorable to Airborne if the court related CTS to the industrial injury.

Recognizing this fact, Airborne argues that if the CTS is related to the accident, it was error as a matter of law for the trial court to fix any degree of disability. Airborne contends that because Goodman received treatment for the CTS after the Department found him to be permanently partially disabled, his condition could not be fixed and stable. Since, according to Airborne, “medically fixed and stable is a requirement of claim closure” (Brief at 22), the trial court would have erred by finding Goodman permanently disabled (whether totally or partially) if it had decided that the CTS was related to the industrial injury.

Airborne’s argument is flawed. First, Airborne did not appeal the Department’s decision that Goodman’s condition was fixed. Indeed, to the Department Airborne advocated that Goodman’s condition was fixed and his claim should be closed, the very relief it is now challenging. However, because it did not appeal the Department’s order, Airborne is precluded from now arguing that his condition is not fixed, and his claim is not subject to being closed. *Upjohn v. Russell*, 33 Wn. App. 777, 658 P.2d 27 (1983)(holding that a party who does not appeal waives their right to greater relief than the order the other party appeals provides).

Second, the argument relies on post-closure treatment as the basis for keeping the claim open. As noted previously, however, post-closure treatment is not relevant to determining whether a condition is fixed. The

relevant date is the date on which the closure order was issued. *Du Pont v. Dep' of Labor & Indus.*, 46 Wn. App. at 477; *Roberts v. Dep't of Labor & Indus.*, 46 Wn.2d at 425. Evidence relating to what a claimant's condition was after the closure order is irrelevant. *DuPont* at 477. The Department closed Goodman's claim on February 10, 2011. The treatment that Airborne argues precludes finding that Goodman's condition was fixed and stable did not occur until May. Therefore, that treatment cannot preclude finding that his condition was fixed and stable.

Third, Airborne's basic premise is incorrect and not supported by the authority it cites. Airborne contends that before the court could find Goodman totally permanently disabled, he had to complete treatment for every condition caused by the industrial injury. Stated another way, if treatment could improve any condition related to the industrial injury, it would be premature to find permanent disability of any degree. Of course, the premise is unreasonable on its face. Under Airborne's analysis, an employee who is permanently paralyzed and comatose from an industrial injury that also caused chronic nose bleeds could not be adjudged permanently disabled if treatment was expected to improve the nose bleeds.

The premise is also unsupported by the law. To the extent the authorities Airborne cites apply at all, the cases all involved only partial disability. None of the cases involve alleged total disability. In each case the

condition being treated was a condition whose improvement could affect the disability rating. *Pybus Steel Co. v. Dep' of Labor & Indus.*, 12 Wn. App. 436, 530 P.2d 350 (1975); *Roberts v. Dep't of Labor & Indus.*, 46 Wn.2d 424, 282 P.2d 290 (1955); *Harper v. Dep't of Labor & Indus.*, 46 Wn.2d 404, 281 P.2d 859 (1955); *Miller v. Dep't of Labor & Indus.*, 200 Wash. 674, 94 P.2d 764 (1939). None hold that a finding of permanent total disability cannot be found if the employee is still treating for a condition related to the industrial injury. Importantly, the same logic does not apply to total permanent disability. The fact that one or more of the conditions caused by the industrial injury might improve has no relevance if the other conditions would still leave the employee totally permanently disabled.

More closely analogous, but still inapplicable, is *Pend Oreille Mines & Metals Co. v. Department of Labor & Indus.*, 64 Wn.2d 270, 391 P.2d 210 (1964). In that case the employer argued that despite continuing to receive treatment the employee could be adjudged permanently totally disabled. The court rejected the contention stating:

It is clear that if a permanently disabled workman is given a lump sum settlement or is placed on the pension roll, the moment he comes under this definition of permanent total disability, he conceivably could be denied medical care and attention when he is in the greatest need since the right to medical aid under the act would terminate at that time. Such a construction would make the act an absurdity by emasculating one of its primary objectives of providing sure and certain relief for workmen, injured in extrahazardous work. RCW 51.04.010. This constitutes a hiatus in the act

since there is no express provision as to the time a workman must be classified as permanently and totally disabled. Considering the act in its entirety, it is implicit that a workman who sustained an industrial injury is entitled to receive medical care and attention as may reasonably be required. The act should therefore be construed, in the light of its declared purpose and intent, by providing that a workman may not be rated for permanent total disability until his condition becomes static or fixed, thereby affording him beneficial care and treatment from the time of his injury.

64 Wn.2d at 272. The Court was thus protecting the employee's right to seek coverage for future treatment. The Court construed the IIA to protect the employee's rights.

The analysis is not applicable here because Goodman, the employee, is the one seeking the rating of permanent total disability. To the extent the rating would preclude him from seeking coverage for future care, the choice is his to make. Because the choice is his, the IIA's objective of sure and certain relief is met by allowing the claim to move forward despite continued treatment rather than forcing his claim to remain open.

7. The trial court correctly declined to consider Airborne's arguments regarding "employability." Airborne waived its right to challenge that aspect of the Department's determination.

Finally, Airborne contends that the trial court erred by prohibiting it from introducing evidence regarding employability. Airborne contends neither its failure to appeal, nor Goodman's limiting the issues on appeal to permanent versus temporary disability, precluded it from arguing that

Goodman was not unemployable. The argument should be rejected for two reasons.

First, Airborne has not and cannot show harm from the decision. In finding of fact 1.12, the trial court specifically stated that its decision would have been the same even if it had considered the issue of employability. The finding is legitimate because the trial court considered the same evidence without that issue in play as it would have considered with it in play. And, the trial court was aware of the issue. Indeed, despite the trial court's ruling, Airborne fully argued the issue of employability in its trial brief. (CP 913-17) As discussed previously, the evidence was more than sufficient for the court to decide that Goodman was totally disabled. Airborne has not pointed to anything more it would have presented if the trial court had not granted Goodman's motion to clarify. Any error is harmless.

Second, the trial court correctly decided that Airborne could not raise the issue of employability because it did not appeal the Board's finding that Goodman was totally disabled. *Upjohn v. Russell*, 33 Wn. App. 777, 658 P.2d 27 (1983). *Upjohn* specifically addressed the scope of a non-appealing party's right to argue. In *Upjohn*, the Department rejected the employee's worker's compensation claim because it concluded that no industrial injury had been sustained. Upon the employee's appeal, the Board's hearing examiner's proposed decision and order reversed the Department's order. The

Department petitioned for review and challenged the examiner's factual determination. The employer did not petition for review. The Board denied the Department's petition and adopted the proposed decision and order as the final order of the Board. Then the employer appealed, relying on the same factual grounds as originally set forth in the Department's petition. The trial court dismissed the appeal. The appellate court decided that the employer's failure to appeal from the Department's order was not fatal because the employer was not aggrieved by that order. But because the employer was aggrieved by the Board's decision, the failure to appeal from that decision waived all objections to it. The court gave an example how this worked:

Thus, for example, we look at an employee who claimed full disability, but is awarded 50 percent disability. If he does not petition and the employer does, and if the Board would decrease the award to 25 percent, the employee would not have waived the right to appeal up to a 50 percent award, but he would have waived the right to appeal for more than that."

33 Wn. App. at 781. Stated another way, a party must appeal once it becomes aggrieved. Accord, *Rose v. Dep't of Labor & Indus.*, 57 Wn. App. 751, 756-57, 790 P.2d 201 (1990); *Carnation Co., Inc. v. Hill*, 54 Wn. App. 806, 810-11, 776 P.2d 158 (1989); *Longview Fibre Co. v. Dep't of Labor & Indus.*, 58 Wn. App. 751, 757, 795 P.2d 699 (1989)(employee's failure to appeal bars him from proposing a new method of calculating the apportionment of attorney fees.)

Here, both the appeals judge and the Board specifically found that Goodman was temporarily totally disabled and therefore unemployable. In the trial court, Airborne wanted to argue that Goodman was employable and the finding of total disability was unfounded. Goodman was, therefore, aggrieved by the appeal judge's and the Board's findings. Yet Airborne did not petition for review from the appeal judge's decision or appeal the Board's decision. The trial court therefore properly decided that Airborne had waived its right to challenge that part of those decisions.

Airborne's argument that Goodman could not limit the issues on appeal is similarly unfounded. Unless a party cross appeals, the appeal is necessarily limited to the issues the appellant chooses to raise.

8. The Court should award Goodman his attorney fees and costs.

RCW 51.52.130(1) provides that if, on appeal to the appellate court by a party other than the worker and the worker's right to relief is sustained, "a reasonable fee for the services of the workers or beneficiary's attorney shall be fixed by the court." Pursuant to this statute, the trial court awarded Goodman's attorney fees. (CP 1032) Goodman asks the Court to award his attorney fees on appeal.

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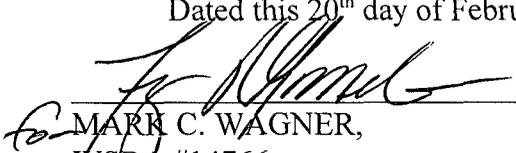
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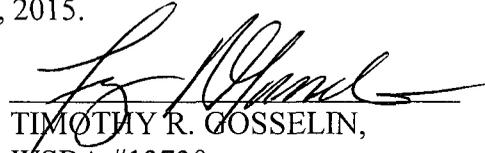
CONCLUSION

For the foregoing reasons, Goodman asks that the Court affirm the judgment in this case and award him his reasonable attorney fees and costs.

Dated this 20th day of February, 2015.



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COURT OF APPEALS FOR
THE STATE OF WASHINGTON
DIVISION TWO

JAMES D. GOODMAN

Respondent,

vs.

DEPARTMENT OF LABOR AND
INDUSTRIES OF THE STATE OF
WASHINGTON,

Respondent

and AIRBORNE EXPRESS, INC.

Appellant.

NO. 47375-5-II

DECLARATION
OF SERVICE

FILED
COURT OF APPEALS
DIVISION II
2015 FEB 20 PM 5:02
STATE OF WASHINGTON
BY _____
DEPUTY

I, TIMOTHY R. GOSSELIN, declare and state:

I am a citizen of the United States of America and the State of Washington, over the age of twenty-one (21), not a party to the above-entitled proceeding, and competent to be a witness therein.

On the 20th day of February, 2015, I did place in the United States Mail, first class postage affixed, the following documents:

1. BRIEF OF RESPONDENT JAMES D. GOODMAN

and this declaration directed to and to be delivered to:

DECLARATION
OF SERVICE
Page 1

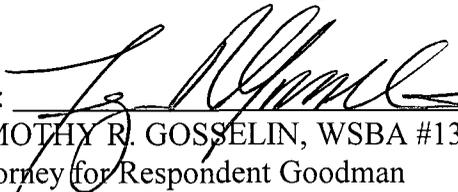
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I declare and state under the penalty of perjury under the laws of
the State of Washington that the foregoing is true and correct.

Signed this 20th day of February, 2015 at Tacoma, Washington.

By : 
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Attorney for Respondent Goodman